G BALAN GOVINDASAMY v. LEE MOI MOI & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
ASMABI MOHAMAD JCA
[CIVIL APPEALS NO: B-01(NCVC)(W)-146-04-2016 &
B-01(NCVC)(W)-171-05-2016]
29 MARCH 2017

CONTRACT: *Agreement – Sale and purchase agreement – Sale of land – Fraud – Purchasers entered into agreement with fraudster who claimed to be registered proprietor of land – Solicitor acted on behalf of fraudster with warrant to act – Land search showed that fraudster was registered proprietor – Money held by solicitor as stakeholder released to fraudster – Whether solicitors, Registrar of Titles and State Government negligent – Apportionment of liability of negligent parties*

LAND LAW: *Sale and purchase of land – Fraud – Purchasers entered into agreement with fraudster who claimed to be registered proprietor of land – Land search showed that fraudster was registered proprietor – Money held by solicitor as stakeholder released to fraudster – Whether Registrar of Titles and State Governments negligent in issuing original issue document of titles and in not maintaining proper records of transfer of lands*

LEGAL PROFESSION: *Duty of care – Negligence – Sale of land – Purchasers entered into agreement with fraudster who claimed to be registered proprietor of land – Solicitor acted on behalf of fraudster with warrant to act – Land search showed that fraudster was registered proprietor – Money held by solicitor as stakeholder released to fraudster – Whether solicitor had given implied undertaking to purchasers that he had authority to act for true owner of land – Whether solicitor breached warranty of authority to act for true owner of land – Whether solicitor breached duties as stakeholder – Whether solicitor for purchasers negligent in failing to discharge duty as reasonably-skilled conveyancing lawyer*

TORT: *Negligence – Professional negligence – Sale and purchase agreement – Sale of land – Purchasers entered into agreement with fraudster who claimed to be registered proprietor of land – Land search showed that fraudster was registered proprietor – Money held by solicitor as stakeholder released to fraudster – Whether solicitors, Registrar of Titles and State Government negligent – Apportionment of liability of negligent parties*

Pursuant to a sale and purchase agreement ('SPA'), the respondents ('the plaintiffs') purchased a piece of land from a fraudster who claimed to be one Soh Chuan Seng ('the fraudster'), the owner of the said land, for the purchase price of RM2.6 million. The solicitors acting for the fraudster ('the first defendant') forwarded to the solicitor acting for the plaintiffs

('the second defendant') a warrant to act signed by the fraudster. A land search at the Land Registry showed that the fraudster was the registered proprietor. Following that, the plaintiffs deposited RM700,000 with the second defendant who, in turn, forwarded a cheque for the deposit sum, drawn in favour of the fraudster, to the first defendant, to be held as stakeholders. The plaintiffs lodged a private caveat over the land and the next day, the second defendant forwarded the executed and stamped copies of the SPA to the first defendant. Meanwhile, at the first defendant's request, the plaintiffs deposited the sum of RM52,000 with the second defendant as part payment of the purchase price. The second defendant forwarded the balance purchase price of RM1,848,000 to the first defendant as stakeholders. The first defendant was not to release the same to the fraudster 'unless and until the transfer was duly presented at the relevant land office'. The second defendant was unable to present documents for registration as there was a caveat lodged over the land by Top Glove Engineering Sdn Bhd ('Top Glove'). After Top Glove's caveat was removed, the transfer was registered and the first defendant released the balance purchase price to various third parties. The second defendant was later informed by the solicitors acting for Soh Chuan Seng ('Soh'), the true owner of the land, that Soh had entered into a SPA with Top Glove for the sale of the land and that Soh had never entered into any SPA with the plaintiffs. Concerned about the true ownership of the land, the second defendant advised the first defendant not to release the purchase price to the fraudster but the first defendant already did. Meanwhile, it transpired that the Registrar of Titles ('the third defendant') had entered a Registrar's caveat on the land and Top Glove lodged a second private caveat. The Registrar's caveat was cancelled and the land was transferred to Top Glove. The plaintiffs commenced an action at the High Court against (i) the first defendant for damages for breach of warranty or authority to act and for breach of stakeholder's duties; (ii) the second defendant for negligence (iii) the third defendant and the Selangor State Government ('the fourth defendant') and its officers ('the fifth and sixth defendants'). The High Court Judge ('the HCJ') held that (i) the first defendant had (a) given an implied undertaking to the plaintiffs that he had the authority to act for Soh, the true owner of the land; (b) breached the warranty of authority to act for Soh; (c) breached his duties as stakeholder by releasing the balance purchase price to third parties prior to the expiry of seven days after the presentation of the MOT; (ii) the second defendant was negligent in that he failed to discharge his duty as a reasonably-skilled conveyancing lawyer; and (iii) the third to sixth defendants were negligent in issuing two original issue document of titles and in not maintaining proper records of transfer of lands. The HCJ allowed the plaintiffs' claim and apportioned liability as the following (i) the first defendant (70%); (ii) the second defendant (10%); and (iii) the third to sixth defendants (20%). Hence the present appeal by the first and third to sixth defendants.

Held (allowing first defendant's appeal in part; dismissing third to sixth defendants' appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The doctrine of implied warranty of authority is this: where any person purports to do any act or make any contract as an agent on behalf of a principal, he is deemed to warrant that he has, in fact, authority from such principal to do the act to make the contract in question. If he has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent, to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority. (para 34)

(2) The consideration of the scope of any implied warranty of authority made by the first defendant should be premised on the following underlying principles: (i) the basic representation was only that the agent had authority to act for another and this was something within the agent's own knowledge; (ii) an agent did not warrant that his principal will perform the contract or was solvent or make any other representation as to the principal's attributes or characteristics; (iii) the court should not imply a warranty of authority which had an effect of going beyond the basic representation, save where the necessary promise was to be implied. This is especially so in relation to professionals, including solicitors, who do not usually undertake an unqualified obligation. (para 53)

(3) It was plain that the first defendant warranted to the plaintiffs that he was acting for the fraudster - an imposter pretending to be Soh. As such, this was not a case in which, absent a warrant of authority, the plaintiffs would have no claim against the fraudster, notwithstanding the likelihood that the claim would be against someone who could not be traced and from whom recovery was remote. There was no evidence to justify a finding that the warrant of authority was given on the basis that the first defendant identified the fraudster as the true owner of the land. In other words, there was no evidence to justify an extension of the scope of the implied warranty of authority made by the first defendant. (para 56)

(4) The law on the issue of the first defendant's breach of stakeholder's duties is well settled. A stakeholder is defined as a person who receives money and holds it *in medio* (in the middle) pending the outcome of a future event. The duty of a stakeholder is to hold the money as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands. There was no misdirection on the evidence by the HCJ. (para 57)

(5) Regarding the third to sixth defendants' appeal against the finding that they were negligent in issuing two issue documents of title for the same land and in not maintaining proper records on registration of transfers of land, the court was not persuaded that there was any misapprehension of the facts or any misdirection on the evidence. The finding of the HCJ against the third to sixth defendants on negligence was affirmed. (paras 59 & 60)

(6) The finding of the HCJ holding the first defendant liable for breach of warranty of authority was set aside while the HCJ's finding on the first defendant's liability for breach of stakeholder's duties was affirmed. The apportionment of liability and contribution was varied as follows: (i) the first defendant (30%); (ii) the second defendant (10%); and (iii) the third to sixth defendants (60%). (para 60)

Bahasa Malaysia *Headnotes*

Susulan satu perjanjian jual beli ('PJB'), responden-responden ('plaintif-plaintif') membeli sebidang tanah pertanian daripada seorang penipu yang mendakwa dia adalah Soh Chuan Seng ('si penipu'), iaitu pemilik tanah tersebut, bagi harga belian sebanyak RM2.6 juta. Peguam cara yang mewakili si penipu tersebut ('defendan pertama') mengemukakan kepada peguam cara yang mewakili plaintif-plaintif ('defendan kedua') satu waran untuk bertindak yang ditandatangani oleh si penipu. Satu carian di Pendaftar Tanah menunjukkan si penipu adalah pemilik berdaftar. Berikutan itu, plaintif-plaintif mendepositkan RM700,000 kepada defendan kedua yang seterusnya mengemukakan cek bagi jumlah deposit tersebut, untuk ditunaikan oleh si penipu, kepada defendan pertama agar memegangnya sebagai pemegang amanah. Plaintif-plaintif memasukkan kaveat persendirian atas tanah tersebut dan pada keesokan hari, defendan kedua mengemukakan salinan-salinan PJB yang ditelah dimeterai dan ditera kepada defendan pertama. Sementara itu, atas permintaan defendan pertama, plaintif-plaintif mendepositkan sejumlah RM52,000 kepada defendan kedua iaitu sebahagian bayaran harga belian. Defendan kedua mengemukakan baki bayaran belian sebanyak RM1,848,000 kepada defendan pertama sebagai pemegang amanah. Defendan pertama tidak sepatutnya membayar jumlah ini kepada si penipu kecuali dan hingga pindah milik dibuat di pejabat tanah berkenaan. Defendan kedua tidak dapat mengemukakan dokumen-dokumen pendaftaran kerana kaveat yang dimasukkan atas tanah tersebut oleh Top Glove Engineering Sdn Bhd ('Top Glove'). Selepas kaveat Top Golve disingkirkan, pindah milik didaftarkan dan defendan pertama membuat bayaran baki harga belian kepada pelbagai pihak ketiga. Defendan kedua kemudian dimaklumkan oleh peguam cara yang mewakili Soh Chuan Seng ('Soh'), pemilik sebenar tanah tersebut, bahawa Soh telah memeterai satu PJB dengan Top Glove bagi jualan tanah dan Soh tidak pernah memeterai apa-apa PJB

dengan plaintif-plaintif. Khuatir tentang milikan sebenar tanah tersebut, defendan kedua menasihati defendan pertama agar tidak membuat bayaran harga belian kepada si penipu tetapi defendan pertama sudah pun membuatnya. Sementara itu, Pendaftar Hak Milik ('defendan ketiga') memasukkan kaveat Pendaftar atas tanah tersebut dan Top Glove memasukkan kaveat persendirian kedua. Kaveat Pendaftar dibatalkan dan tanah tersebut dipindah milik kepada Top Glove. Plaintif-plaintif memulakan tindakan di Mahkamah Tinggi terhadap (i) defendan pertama bagi ganti rugi pelanggaran pelantikan atau kuasa pewakilan dan pelanggaran tugas sebagai pemegang amanah; (ii) defendan kedua bagi kecuaian; (iii) defendan ketiga dan Kerajaan Negeri Selangor ('defendan keempat') dan pegawai-pegawainya ('defendan kelima dan keenam'). Hakim Mahkamah Tinggi ('HMT') memutuskan (i) defendan pertama (a) memberi aku janji tersirat kepada plaintif-plaintif bahawa dia mempunyai kuasa mewakili Soh, pemilik sebenar tanah tersebut; (b) melanggar pelantikan kuasa mewakili Soh; (c) melanggar tugas sebagai pemegang amanah apabila membuat baki bayaran harga belian kepada pihak-pihak ketiga sebelum tamat tempoh tujuh hari selepas pengemukaan MOT; (ii) defendan kedua cuai kerana gagal menjalankan tugas sebagai peguam pindah hak yang berkemahiran munasabah; dan (iii) defendan ketiga hingga keenam cuai dalam mengeluarkan dua isu dokumen hak milik asal dan dalam gagal mengemas kini rekod pindah milik tanah-tanah secara teratur. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif dan membahagikan tanggungan seperti berikut: (i) defendan pertama (70%); (ii) defendan kedua (10%); dan (iii) defendan ketiga hingga keenam (20%). Maka timbul rayuan ini oleh defendan pertama dan ketiga hingga keenam.

Diputuskan (membenarkan sebahagian rayuan defendan pertama; menolak rayuan defendan ketiga hingga keenam dengan kos)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Doktrin pelantikan kuasa tersirat beroperasi begini: apabila mana-mana orang mendakwa melakukan apa-apa tindakan atau memasuki apa-apa kontrak sebagai ejen bagi pihak prinsipal, dia dikatakan memberi jaminan dia sebenarnya mempunyai kuasa prinsipal untuk bertindak memasuki kontrak tersebut. Jika dia tidak mempunyai kuasa ini, dia boleh disaman bagi pelanggaran pelantikan kuasa oleh mana-mana pihak ketiga yang terdorong oleh tindakannya yang mendakwa dirinya sebagai ejen, mempercayai bahawa dia mempunyai kuasa melakukan tindakan atau memasuki kontrak dan dengan bertindak sedemikian, mengalami kerugian akibat ketiadaan kuasa.

(2) Pertimbangan bagi ruang lingkup apa-apa pelantikan kuasa tersirat yang dibuat oleh defendan pertama mestilah berdasarkan prinsip-prinsip tersirat ini: (i) pewakilan asas adalah ejen hanya mempunyai kuasa

mewakili orang lain dan ini diketahui oleh ejen tersebut; (ii) seorang ejen tidak menjamin prinsipalnya akan melaksanakan kontrak atau solven atau membuat apa-apa pewakilan tentang ciri-ciri atau sifat prinsipal; (iii) mahkamah tidak sepatutnya menyiratkan pelantikan kuasa yang mempunyai kesan melampaui pewakilan asas, kecuali jika janji yang perlu disiratkan. Ini khusus buat profesional termasuk peguam-peguam cara yang kebiasaannya tidak membuat aku janji bagi kewajipan tidak bertauliah.

(3) Jelas bahawa defendan pertama memberi jaminan kepada plaintif-plaintif bahawa dia bertindak bagi si penipu – seorang yang menyamar sebagai Soh. Oleh itu, ini bukan kes yang, tanpa pelantikan kuasa, plaintif-plaintif tidak boleh menuntut terhadap si penipu, kecuali kemungkinan tuntutan dibuat terhadap seorang yang tidak boleh dikesan dan pemulangan olehnya sesuatu yang sukar. Tiada keterangan yang mewajarkan dapatan bahawa pelantikan kuasa diberi atas alasan defendan pertama mengesahkan si penipu sebagai pemilik sebenar tanah. Dalam kata lain, tiada keterangan yang mewajarkan lanjutan ruang lingkup pelantikan kuasa yang dibuat oleh defendan pertama.

(4) Undang-undang tentang isu pelanggaran tugas pemegang amanah oleh defendan pertama jelas. Pemegang amanah ialah individu yang menerima wang dan memegangnya *in medio* (sebagai orang tengah) sementara menanti keputusan peristiwa akan datang. Tugas seorang pemegang amanah adalah memegang duit bagi kedua-dua pihak sementara menanti peristiwa tersebut dan hingga peristiwa tersebut diketahui, tugasnya adalah memegang wang tersebut. Tiada salah arah pertimbangan keterangan oleh HMT.

(5) Berkenaan rayuan defendan ketiga hingga keenam terhadap dapatan bahawa mereka cuai dalam mengeluarkan dua isu dokumen hak milik bagi tanah tersebut dan gagal mengemas kini rekod pendaftaran pindah milik tanah dengan teratur, mahkamah tidak yakin bahawa terdapat salah faham fakta atau apa-apa salah arah pertimbangan keterangan. Dapatan HMT terhadap defendan ketiga hingga keenam berkenaan kecuaian disahkan.

(6) Dapatan HMT dalam memutuskan defendan pertama bertanggungan bagi pelanggaran pelantikan kuasa diketepikan manakala dapatan HMT tentang tanggungan defendan pertama bagi pelanggaran tugas pemegang amanah disahkan. Pembahagian tanggungan dan sumbangan diubah seperti berikut: (i) defendan pertama (30%); (ii) defendan kedua (10%); dan (iii) defendan ketiga hingga keenam (60%).

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***
Bristol & West Building Society v. Fancy Jackson And Other Actions [1997] 4 All ER 582 ***(refd)***
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA ***(refd)***
Collen v. Wright [1857] 8 E & B 647 ***(refd)***
Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***
Dickson v. Reuters Telegram Co (1877) 3 CPD 1 ***(refd)***
Excel Securities Plc v. Masood [2010] Lloyd's Rep PN 165 ***(refd)***
Firbanks's Exors. v Humphreys (1886) 18 QBD 54 ***(refd)***
Fong Maun Yee & Anor v. Yoong Weng Ho Robert (practising under the name and style of Yoong & Co) [1997] 2 SLR 297 CA ***(refd)***
Frank Houlgate Investment Co Ltd v. Biggart Baillie LLP [2011] CSOH 160 ***(refd)***
Fullji Realty Sdn Bhd v. Lim Yong Meng & Anor [2007] 1 LNS 283 HC ***(refd)***
Hampden v. Walsh [1976] 1 QBD 189 ***(refd)***
Knight Frank v. Aston Du Haney [2011] EWCA Civ 404 ***(refd)***
Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1982] 1 LNS 73 HC ***(refd)***
Lau Tek Sen @ Lau Beng Chong & Ors v. SK Song [1995] 2 CLJ 425 HC ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Leggo v. Brown & Dureau Ltd [1923] 32 CLR 95 ***(refd)***
Nelson v. Nelson [1997] WLR 233 ***(refd)***
P & P Property Limited v. Owen White & Catlin LLP & Anor [2016] EWHC 2276 (Ch) ***(refd)***
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2015] 6 CLJ 740 CA ***(refd)***
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2016] 9 CLJ 297 FC ***(refd)***
Penn v. Bristol and West Building Society And Others [1997] 3 All ER 470 ***(refd)***
SEB Trygg Liv Holding AB v. Manches [2005] EWCA Civ 1237 ***(refd)***
Sino-British (M) Ltd v. Nanyang Development Company (M) Ltd & Anor [1969] 1 LNS 175 HC ***(refd)***
SPH De Silva Ltd v. Balwant Singh [1960] 1 LNS 121 HC ***(refd)***
Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(refd)***
Yonge v. Toynbee [1908-10] All ER Rep 204 ***(refd)***
Zwebner v. The Mortgage Corporation Ltd [1998] PNLR 769 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 180, 181, 183, 186, 188

Other source(s) referred to:

Bowstead & Reynolds on Agency, 19th edn, p 581
Halsbury's Laws of England, 'Agency', 4th edn, reissue, vol 1(2), para 172

(Civil Appeal No: B-01(NCVC)(W)-146-04-2016)

For the appellant - R Thayalan, RN Sivaraja & V Priyadharisini Nair; M/s Balan Govind & Assocs
For the 1st, 2nd, 3rd & 4th respondents - Rajashree Suppian & Goh Chee Hong; M/s Simon Hue & Assocs
For the 5th respondent - Leong Wai Hong & David Tan; M/s Skrine
For the 6th respondent - Wan Norazimin Kassim, Salwati Umar & Nurhamimah Amrah; State Legal Advisors

(Civil Appeal No: B-01(NCVC)(W)-171-05-2016)

For the appellant - Wan Norazimin Kassim, Salwati Umar & Nurhamimah Amrah; State Legal Advisors

For the 1st, 2nd, 3rd & 4th respondents - Rajashree Suppiah & Goh Chee Hong; M/s Simon Hue & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22NCVC-435-08-2014 (affirmed; overruled).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The first to fourth plaintiffs purchased a piece of land from the purported owner. It later transpired that the purported owner was not the true owner of the land but a fraudster who impersonated the true owner. Consequently, the plaintiffs failed to acquire title to the land. The plaintiffs sued the solicitors (the first defendant) who were acting for the purported owner for damages for breach of warranty of authority to act and for breach of stakeholders' duties. The plaintiffs also sued (i) their own solicitors (the second defendant) for negligence, (ii) the Registrar of Titles and the Selangor State Government (third and fourth defendants) and its officers (fifth and sixth defendants) for negligence and breach of statutory duties.

[2] After a full trial of the action, the learned judge allowed the plaintiffs' claim and apportioned liability against the defendants as follows:

first defendant	-	70%
second defendant	-	10%
third - fourth defendants	-	20%

[3] Appeal 146 is by the first defendant whilst appeal 171 is by the third to sixth defendants. In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[4] The background facts in this case have been comprehensively set out in the judgment of the learned judge. We shall set out a brief summary of the salient facts.

[5] Pursuant to a sale and purchase agreement dated 1 June 2012 ("the SPA") the plaintiffs purchased a piece of agricultural land from a fraudster who claimed to be Soh Chuan Seng, the purported owner for the purchase price of RM2.6 million. The first defendant was acting as solicitors for the fraudster whilst the second defendant was acting for the plaintiffs.

[6] Prior to the execution of the SPA, the following events transpired:

(i) the first defendant had forwarded *via* e-mail to the second defendant a "warrant to act" dated 9 May 2012 signed by the fraudster;

(ii) a land search at the Land Registry showed that the fraudster was the registered proprietor;

(iii) the plaintiffs had deposited the deposit sum of RM700,000 ("the deposit sum") with the second defendant;

(iv) the second defendant forwarded a cheque for the deposit sum drawn in favour of the fraudster to the first defendant to be held as stakeholders; and

(v) on 31 May 2012, the first defendant wrote to the second defendant confirming that the original issue document of title ("IDT") was in his possession and that the fraudster did not have an income tax file reference. He also enclosed the SPA and the memorandum of transfer duly executed by the fraudster, certified true copies of the IDT, quit rent receipt and the fraudster's identity card.

[7] On 4 June 2012 the plaintiffs lodged a private caveat over the land. The following day, the second defendant forwarded the executed and stamped copies of the SPA to the first defendant. Meanwhile, at the first defendant's requests, the plaintiffs deposited the sum of RM52,000 with the second defendant as part payment of the purchase price. The second defendant would remit the said sum to the Inland Revenue Board to account for real property gains tax on the fraudster's behalf.

[8] On 30 August 2012, the second defendant forwarded the balance purchase price of RM1,848,000 to the first defendant as stakeholders. The first defendant was not to release the same to the fraudster "unless and until the transfer is duly presented at the relevant land office". On 3 September 2012, the second defendant received the original IDT and related documents from the first defendant.

[9] The second defendant was unable to present the transfer documents for registration as there was a caveat lodged over the land by Top Glove Engineering Sdn Bhd ("Top Glove"). However, after Top Glove's caveat was subsequently removed the transfer was registered at the Land Registry on 10 September 2012. On 12 September 2012, the first defendant released the balance purchase price to various third parties.

[10] On 14 September 2012, the second defendant was informed by Messrs Abraham Ooi & Partners ("the solicitors") acting for Soh Chuan Seng ("Soh") the registered proprietor of the land that Soh had entered into a sale and purchase agreement with Top Glove for the sale of the land and that Soh had never entered into any agreement with the plaintiffs.

[11] Concerned as to the true ownership of the land, the second defendant wrote to the first defendant on 19 September 2012 advising the first defendant not to release the purchase price to the fraudster. In his reply, the first defendant informed that, he had released the balance purchase price to the fraudster on 12 September 2012 since the land had already been registered in the plaintiffs' name on 10 September 2012.

[12] Meanwhile, the balance purchase price had been disbursed to various third parties: RM1.654m to Fasa Suria Malaysia Sdn Bhd, RM168,000 to Yau Eng See and RM13,700 to Perumal a/l Arumugam; the remaining RM12,300 went towards the first defendant's legal fees. Subsequently, the first defendant returned RM12,300 and Perumal's portion of RM13,700 to the second defendant. Yau Eng See also returned his portion of RM168,000 to the plaintiffs.

[13] Meanwhile, it transpired that the third defendant had entered a Registrar's caveat on the land on 19 September 2012 and Top Glove had lodged a second private caveat on 26 September 2012. However, the Registrar's caveat was cancelled on 9 November 2012 and the land was transferred to Top Glove on 29 November 2012.

Findings Of The High Court

[14] The findings of the learned judge may be summarised as follows:

(i) The first defendant has given an implied undertaking to the plaintiffs that he has the authority to act for Soh the true owner of the land;

(ii) The first defendant had breached the warranty of authority to act for Soh the true owner of the land (*Penn v. Bristol and West Building Society And Others* [1997] 3 All ER 470 (CA));

(iii) The first defendant breached his duties as stakeholder when the first defendant failed to comply with the terms of cl. 5(b) of the SPA by releasing the balance purchase price to third parties prior to the expiry of seven days after the presentation of the memorandum of transfer (*Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533 (FC);

(iv) The second defendant was negligent in that he failed to discharge his duty as a reasonably skilled conveyancing lawyer;

(v) The third to sixth defendants were negligent in issuing two original IDT and in not maintaining proper records on registration of transfers of land;

(vi) The first defendant's counterclaim against the plaintiffs for various declarations was dismissed; and

(vii) The first defendant's counterclaims against the second and third defendants were also dismissed;

Submission Of Parties

[15] Learned counsel for the first defendant submitted on two main issues: (i) whether there is a breach of warranty to act, and (ii) whether there is a breach of stakeholder's duty.

[16] On the first issue, learned counsel argued that the general principles in *Penn v. Bristol (supra)* is not applicable to the present case. He argued that the warrant to act merely stated that the first defendant was appointed to act for the fraudster under the name of Soh only and nothing more. The fraudster had his identity card with his face bearing Soh's name and he also had the original IDT. The identity card number and the face corresponded with the fraudster. The first defendant also took photocopies of the identity card. As the imposter was not who he said he was, he argued that the first defendant's position is exactly the same as the solicitor concerned in *P & P Property Limited v. Owen White & Catlin LLP & Anor* [2016] EWHC 2276 (Ch) where the English High Court held that the solicitor did not commit a breach of the warranty of authority to act. Learned counsel also alluded to *Lau Tek Sen @ Lau Beng Chong & Ors v. SK Song* [1995] 2 CLJ 425 and *Fullji Realty Sdn Bhd v. Lim Yong Meng & Anor* [2007] 1 LNS 283; [2007] 3 MLJ 39 where the courts referred to *Yonge v. Toynbee* [1908-10] All ER Rep 204 and *Penn v. Bristol (supra)* was not considered.

[17] Learned counsel also argued that in the present case, it is not disputed that the fraudster existed. Prior to the execution of the SPA, there were negotiations between the fourth plaintiff and one Mr Ang, a friend of the fraudster. The agreement to enter into the SPA had already been made even before the parties came to see the first defendant. Therefore, he argued that it cannot be the representation of the first defendant which induced the plaintiffs to buy the land. The plaintiffs relied on Ang's representation. There was therefore no breach of warranty of authority to act. The learned judge's finding that the first defendant was careless in that the first defendant would have known that his client was not the real Soh if he had conducted the caveat search on the land is not relevant to this issue.

[18] As to the second issue, learned counsel argued that the plaintiffs have not pleaded any cause of action for breach of stakeholder's duties (*Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 (SC); *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357 (CA)). Even if there was a stakeholder's duty there was no breach of it. The second defendant acting for the plaintiffs in the SPA had varied cl. 5(b) of the SPA which variation was accepted and acted upon by the first defendant acting for the fraudster. Further, the monies paid to the third parties were paid on account of the fraudster and not by the first defendant on his own accord.

[19] In reply, learned counsel for the plaintiffs argued that pursuant to the warrant to act, the first defendant represented to the plaintiffs that he had the authority for Soh in the sale and purchase transaction of the land. As such,

the first defendant knew that the second defendant and the plaintiffs would be relying on his having the authority of Soh to bring the transaction to fruition. In fact, the plaintiffs through their solicitor the second defendant did rely on the first defendant as having the authority of Soh to complete the sale in that all the conveyancing documents were finalised and executed through the first defendant. Whether the first defendant was acting *bona fide* or not knowing that his client was a fraudster is no defence (*Lau Tek Sen (supra)*; *Yonge v. Tonybee (supra)*; *Fong Maun Yee & Anor v. Yoong Weng Ho Robert (practising under the name and style of Yoong & Co)* [1997] 2 SLR 297 CA; *Wong Kiong Hung & Anor v. Chang Siew Lan & Anor Appeal* [2009] 3 CLJ 751 (CA)).

[20] Learned counsel for the plaintiffs also argued that the fact that the first defendant breached his duties as a stakeholder is pleaded in para. 50 of the amended statement of claim. It was also submitted that the learned judge had applied the correct principle of law on the facts in holding that the terms of the stakeholding contained in cl. 5(b) of the SPA required the first defendant as the fraudster's solicitors to release the balance purchase price to the vendor upon the expiry of seven days of the presentation of the transfer documents. In breach of the express terms, the first defendant not only released the monies to various third parties including himself but also released the same before the expiry of the stipulated seven days from the presentation of the transfer documents. Had the first defendant complied with the terms of his stakeholding, the balance purchase price would only have been released on 19 September 2012 which was the very date he was asked to hold the release of the same.

[21] For the second defendant, learned counsel argued that *P & P Property Limited, (supra)* is distinguishable on the facts as there was no warrant to act in that case. In the present case, the warrant to act refers to the land in question. The question of apportionment of blame is a question of fact to be decided at the discretion of the trial court and should not be disturbed by an appellate court (*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585; [2003] 1 MLJ 567 (CA)).

[22] For the third defendant, learned State Assistant Legal Adviser ('ALA') adopted the submission of counsel for the plaintiffs and the second defendant. However, learned ALA also argued that the first defendant was negligent because he failed to verify with the land office the discrepancy between Soh's address in the photocopy of the identity card and in the IDT. At any rate, the third defendant was only acting in an administrative capacity when it registered the transfer of the land into the names of the plaintiffs. When the first defendant conducted the land search, it issued the search report in accordance with its administrative duties. The third defendant took all necessary steps to verify the ownership of the land and acted in good faith. As such, the third defendant is not liable. Only one IDT was issued by the third defendant. The IDT with the first defendant is not the original title.

Decision

[23] The first question to be considered relates to the issue of breach of warranty of authority. Learned counsel for the first defendant cited *P & P Property Ltd (supra)* to support his argument that the first defendant's client was a fraudster impersonating the true owner and that the first defendant was acting on the fraudster's instructions. Therefore, the implied warranty to act is limited to the authority to act for the fraudster and not for the true owner of the land.

[24] *P & P Property Ltd (supra)* was not considered by the learned judge as the judgment of the English High Court was only delivered subsequent to the judgment of the learned judge in the present case.

[25] In *P & P Property Ltd (supra)*, Ms Lim, a consultant solicitor at Owen White had acted for an individual who introduced himself as Clifford Harper the owner of a residential property. Ms Lim dealt with P & P Property's (the purchaser) solicitors in the sale transaction. The contract was expressed to be between the seller and buyer; the seller was identified as "Clifford Michael Phillip Harper of 52 Brakenbury Road, London W6". Ms Lim signed the contract on behalf of the fraudster. That individual turned out to be a fraudster who had impersonated the true owner. As a result, the plaintiff failed to get title to the property and the fraudster had disappeared with the purchase price. The plaintiff sued Owen White for breach of warranty of authority, negligence, breach of trust and breach of undertaking on the basis that they had authority to act for the owner of the property, and that they were properly instructed by the true Clifford Harper, when they were not.

[26] In his judgment, Robin Dicker QC (sitting as a Deputy High Court Judge) opined that "[t]he doctrine of warranty of authority, although firmly established ever since the decision in *Collen v. Wright* in 1857, has been described as anomalous and fraught with difficulties; see Reynolds, Breach of warranty of authority in modern times [2002] LMCLQ 189 at p. 191". The learned Deputy High Court Judge found that whilst Owen White had the authority of the fraudster, the issue was whether Ms Lim is to be taken as having impliedly promised not merely that she had the authority of her client, which she did, but also that she had the authority of the true Mr Harper and owner of the property.

[27] The learned Deputy High Court Judge found that P & P Property failed to establish the necessary warranty of authority on the basis that Owen White identified their principal as the registered title owner, on the following grounds.

(a) First, an agent does not, simply by acting as agent, represent that his principal will perform the contract or is solvent or make any other representation as to the principal's attributes or characteristics. The court should not imply a warranty of authority which has an effect of

going beyond the basic representation, save where it is clear that the necessary promise is properly to be implied, particularly so in relation to professionals, including solicitors, who do not normally undertake an unqualified obligation.

(b) Secondly, as far as Ms Lim and the purchaser's solicitor (Mr Robinson) were concerned, "Clifford Michael Phillips Harper" was Ms Lim's client and the person selling the property who, they both assumed, was also the true owner. It turned out that this was incorrect. The question is whether, in these circumstances, Ms Lim is to be taken as having impliedly promised not merely that she had the authority of her client, which she did, but also that she had the authority of the true Mr Harper and owner of the property. Mr Robinson's evidence was not that he understood that such a warranty had been given, but rather that he assumed that Owen White would have taken appropriate steps to establish their client's identity and that he had no reason to doubt that as a professional firm Owen White had not done all the correct due diligence to establish the identity of their client as the true owner of the property. Mr Robinson accepted that he knew that he could have taken steps to protect his client against the risk which he understood existed but did not do so.

(c) Thirdly, the implications of such a warranty of authority would be difficult to reconcile if a solicitor who acts for someone purporting to sell a property thereby warrants that their client is the registered title holder, solicitors engaged in conveyancing transactions would effectively be guaranteeing that their client was the registered title holder, and would be strictly liable if this was not the case.

What Is A Warranty Of Authority?

[28] In the context of the law of agency, what is warranted by an agent is quite straightforward. The party acting for another, the agent, warrants that he has authority from another person (the principal). The person making the warranty represents that he is an authorised agent for and on behalf of a principal.

[29] In contrast, the general rule is that where an agent has contracted as an agent, the agent cannot be made personally liable to the third party who contracted with him: s. 183 of the Contracts Act 1950. If, however, the agent had no authority to contract and the contract was entered not on the strength of the representation of authority made by the agent, the agent will be so personally liable: ss. 180, 181, 186, 188 of the Contracts Act 1950.

[30] As such, what is warranted is only that the agent has authority from his principal: this is something within the agent's knowledge. Ordinarily, an agent does not warrant beyond that. For instance, he does not warrant

(i) that his principal is solvent (*Leggo v. Brown & Dureau Ltd* [1923] 32 CLR 95); or (ii) that his principal will perform the contract, or in the context of litigation, the agent, normally a solicitor does not promise that a claim is valid.

[31] Difficulties, however, arise when the cause of the lack of authority is that the principal has never existed, no longer exist, or lack capacity. Where a person, by words or conduct, represents that he has actual authority to act on behalf of another, and a third party is induced by any representation to act in a manner in which he would not have acted if that representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third party by a breach of that implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority (*Bowstead & Reynolds on Agency*, 19th edn at p. 581).

The Doctrine Of Breach Of Warranty Of Authority

[32] To begin with, it is pertinent to note that s. 188 of the Contracts Act 1950 is analogous to the common law doctrine of implied warranty of authority by the agent. This doctrine which was established in the case of *Collen v. Wright* [1857] 8 E & B 647, Ex Ch enunciates that an agent who impliedly warrants that he has authority, is liable to be sued on his warranty. The duty is grounded on an implied warranty by the agent that he has authority and the action, being in contract, lies even if the agent honestly believed he had authority. Section 188 reads as follows:

> Liability of pretended agent
>
> A person untruly representing himself to be the authorised agent of another, and thereby inducing another person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or any damage which he has incurred by so dealing.

[33] In *Collen v. Wright (supra)*, a land agent had purported to sign a lease of a farm on behalf of a person who had not given him authority to do so. Consequently, the lease was not enforceable against the client and the third party's action for specific performance failed. The land agent was found liable to the third party irrespective of negligence. It was held that a person who professes to act as an agent impliedly contracts with the third party that he has authority to act on behalf of his principal. The third party recovered the costs of his specific performance action as damages for breach of this implied contract. *Collen v. Wright (supra)* involved creating a contractual liability for a particular type of representation, and hence a strict liability. Accordingly, where a professional agent represents to a third party that he is acting as an agent whilst having neither actual nor apparent authority to do so, he will incur liability to the third party. Branwell LJ described the doctrine in *Dickson v. Reuters Telegram Co* (1877) 3 CPD 1, 5 in the following manner:

> *Collen v. Wright* establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen v. Wright*.

[34] Stated simply, the doctrine of implied warranty of authority is this: where any person purports to do any act or make any contract as agent on behalf of a principal, he is deemed to warrant that he has, in fact, authority from such principal to do the act to make the contract in question. And if he has no such authority, he is liable to be sued for breach of warranty of authority by any third person who was induced by his conduct in purporting to act as agent, to believe that he had authority to do the act or make the contract, and who, by acting upon such belief, has suffered loss in consequence of the absence of authority (*Halsbury's Laws of England*, 'Agency', 4th edn, reissue, vol 1(2), para. 172).

[35] Insofar as the doctrine relates to solicitors, a review of the following cases indicates that the courts have both extended and limited the scope of the action. In *Yonge v. Toynbee (supra)* the solicitor entered an appearance in a defamation action not knowing that the defendant, who had hitherto instructed it, had been certified insane. The firm was held liable for the costs of the other side on the basis of an implied warranty or contract that they had the authority. The reasoning of the court is plainly directed towards the proposition that liability for breach of warranty of authority is strict. The justification is that, if the agent does not have the authority which he claims, the third party may have no claim against the supposed principal. Treating the agent, in such a situation, as having impliedly warranted his authority, gives the third party a claim against the agent, where otherwise he may have no claim at all.

[36] In *Penn v. Bristol (supra)*, the English Court of Appeal held a solicitor involved in the sale of land owned by a husband and wife, who had the authority of the husband to sell it but not that of the wife (whose signature had been forged), was liable, not only to the purchaser, but to a mortgage lender who lost out when it transpired that the sale was void. The solicitor for the vendor had had no direct dealings with the mortgage lender though it had every reason for knowing that there was likely to be one.

[37] *Bristol & West Building Society v. Fancy Jackson And Other Actions* [1997] 4 All ER 582 is another case concerning a proposed re-mortgage by a husband and wife of their house to secure an advance from a building society. The wife did not know of the transaction and her signature on the mortgage deed had been forged. The defendants were solicitors acting for the mortgagor and mortgagee. The defendants were found to be in breach of their retainer and liable for breach of warranty of authority. The English High

Court held that the solicitors must be taken to have warranted to the lender that the mortgage deed which he delivered on completion as solicitor for the borrowers was delivered with the authority of both the husband and wife. Chadwick J said at pp. 612-613:

> I can see no reason why the position should be different in the circumstances that the same solicitor acts for both lender and borrower. I do not hold that the duty of the solicitor, as solicitor for the lender, is increased by the fact that he acts also for the borrowers; but, equally, I can see no reason why, as solicitor for the borrowers, he should not be taken to warrant to the lender that he is acting for them in the transaction with their authority. This does not, necessarily, mean that he is warranting that the signature on the mortgage deed is authentic; but it has much the same effect.

[38] In *Nelson v. Nelson* [1997] WLR 233, the solicitors had been instructed by the plaintiff to take the necessary steps to protect the plaintiff's interest in a landed property. However, the plaintiff being an undischarged bankrupt had no interest in the property, which had vested in the trustee in bankruptcy. Peter Gibson LJ said at p. 237:

> *Prima facie* his authority is to bring proceedings in the name of his client and I do not see that he warrants more than that he has a retainer from the client who exists and has authorised the proceedings and against whom a costs order can be made. He does not warrant that the client has a good cause of action or that the client is solvent.

[39] *Zwebner v. The Mortgage Corporation Ltd* [1998] PNLR 769 is another instance of mortgage fraud over a house jointly owned by a husband and wife. The husband applied for a loan to be secured on the property. The lenders instructed the solicitors to act in the matter. Later, the solicitors received what appeared to be instructions to also act for the borrowers. It turned out that the husband had forged his wife's signature on the mortgage deed. The wife sued the lender claiming that the mortgage was not binding on her. The lender brought third party proceedings against the solicitors claiming among others, that certain statements in the report on title that they produced amounted to a warranty that the wife's signature was genuine. The report on title contained an express undertaking by the solicitors that "all appropriate documents will be properly executed on or before completion". At first instance, Lloyd J held that the solicitors were liable for breach of their express undertaking that all appropriate documents would be properly executed on or before completion. The solicitors' appeal to the Court of Appeal was dismissed.

[40] In *SEB Trygg Liv Holding AB v. Manches* [2005] EWCA Civ 1237 Buxton LJ, delivering the judgment of the court said at [66] that:

> … it is important to bear in mind that generally a solicitor conducting proceedings does not warrant what he says or does on behalf of his client. Thus he does not warrant that his client, the named party to proceedings, has title to sue, is solvent, has a good cause of action or defence or has

A any other attribute asserted on his behalf. The solicitor relies upon his client's instructions for all these things, as he will do for naming his client correctly. As he gives no warranty as to the accuracy of his instructions generally, it is difficult to see why the naming of his client should be treated as an exception. Why should this be any different, for example, from the naming of a client who has no title to sue?

B

[41] In *Knight Frank v. Aston Du Haney* [2011] EWCA Civ 404, Tomlinson LJ referred to the *SEB Trygg (supra)* case at [14]-[15]. He said that in such circumstances, it is axiomatic that a solicitor gives no warranty as to the accuracy of his instructions. He referred to the statement by Bowstead & Reynolds on Agency that "the basic warranty is only that the agent has

C authority from his principal: this is something peculiarly within the agent's knowledge. If the principal proves unreliable, that is something in respect of which the third party could have made enquiries".

[42] In *Excel Securities Plc v. Masood* [2010] Lloyd's Rep PN 165,

D concerning a mortgage fraud, the lender a specialist in short-term commercial loans on the security of land, had agreed to make a loan to an individual claiming to be a Mr Goulding which was to be secured on a property in his name. The whole set up was a scam involving identity theft by the borrower and a property which had no connection with the supposed borrower. The

E lender sued the borrower's solicitors alleging that they had given a warranty as to the identity of their client, the borrower, and that, because the borrower was an imposter, they were in breach of that warranty. The solicitors were held not liable, on the basis that all they warranted was that they had authority to act on behalf of a person identifying himself as Mr Goulding and claiming to be the registered proprietor of the property.

F

[43] In a Scottish case, *Frank Houlgate Investment Co Ltd v. Biggart Baillie LLP* [2011] CSOH 160; [2012] PNLR 2, solicitors acted for a named businessman who granted a security over the property of which he was not the title holder. The lender had actually met and had discussions with the

G borrower, and it was held here that the warranty was only of authority from the named person, and no further warranty of his relationship to the subject matter was required to be implied.

[44] Section 188 of the Contracts Act 1950 was referred to in a number of cases. In *SPH De Silva Ltd v. Balwant Singh* [1960] 1 LNS 121; [1960] MLJ

H 175, an agent was held liable because he had contracted on behalf of the association without authority, and was therefore liable to make compensation to the third person. In *Sino-British (M) Ltd v. Nanyang Development Company (M) Ltd & Anor* [1969] 1 LNS 175; [1969] 1 MLJ 117, the agent had untruly represented himself as the authorised agent and whose

I act was not ratified by the principal. The agent was held to be personally liable to make good the loss and damage suffered by the third person.

[45] In *Fullji Realty Sdn Bhd (supra)*, s. 188 was referred to in a case dealing with a purported sale and purchase of land by an imposter vendor. The plaintiff's claim against the defendant was for loss suffered in consequence of the defendant's breach of warranty of authority in a purported sale and purchase of a land by an imposter who claimed to be the registered proprietor and for whom the defendant had acted as solicitor. Kang Hwee Gee J (later JCA) held that (i) to constitute a breach of warranty of authority, the defendant solicitor must have warranted to the plaintiff that he was authorised to act for the registered proprietor to sell the land and in consequence thereof induced the plaintiff to sign the option agreement and sale and purchase agreement and to part with its money; (ii) the evidence clearly indicates that this was not the case. The plaintiff had already made up his mind to purchase the land from the imposter before the parties had gone to see the defendant solicitor at his office; and (iii) the narrative clearly supports the fact that the parties (consisting of the plaintiff, the imposter and other persons accompanying the imposter) had gone to see the defendant only for the purpose of appointing the defendant to act for the vendor, having earlier decided between themselves and the solicitor for the purchaser that the defendant should act for the registered proprietor. As such, the learned judge held that "[i]t is well nigh impossible to conclude that the defendant had warranted to the plaintiff that he was authorised to act for the registered proprietor to sell the land".

[46] The governing principles may be distilled as follows. As a general rule, an agent is liable for breach of warranty of authority if the third party has relied on his claim to authority. The agent's liability arises not from any wrong or omission on his part, but from an implied undertaking made by him that the authority he professes to have does in point of fact exist. It matters not whether the agent acted *bona fide* or under a mistaken belief or had no means of knowledge.

[47] What then is the test for determining when such a warranty is deemed to be given. In *Leggo v. Brown (supra)* at 106, the court described the ingredients as follows:

> The essentials are (1) assertion of authority; (2) inducement by asserting; (3) transaction which but for that assertion the other party would not have entered into.

[48] In *Firbanks's Exors. v Humphreys* (1886) 18 QBD 54, Lord Esher MR put the test in the following manner at 60:

> The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred.

[49] Ultimately, the question of whether a warranty of authority has been given and, if it has, the terms and effect of that warranty, is a question of fact to be decided on the circumstances of each case. We appreciate the fact that particular difficulties arise if the person from whom the agent is taking instructions is a fraudster impersonating someone else.

[50] Nevertheless, in determining whether a warranty of authority can be implied in the circumstances of this case, the court should first consider who the first defendant represented that he had the authority to act for; and if so, what attributes, if any, the first defendant represented that such person had.

[51] In this connection, we are inclined to agree with the views expressed by the learned Deputy High Court Judge in *P & P Property Ltd (supra)*, that *Penn v. Bristol (supra)* and *Bristol & West Building Society v. Fancy Jackson (supra)* represent a straightforward application of the doctrine of warranty of authority. *Zwebner v. The Mortgage Corporation Limited (supra)* is distinguishable on the basis that the relevant part of the appeal was primarily concerned with the construction of an express undertaking which the solicitors had given to the lenders, rather than with the doctrine of warranty of authority. He opined that these cases do not establish that any solicitor who acts for someone impersonating the true owner is necessarily liable for breach of warranty of authority; and that the question whether a warranty of authority has been given rests upon a proper analysis of the facts in any given situation, and not on any preconceived notions.

[52] *Penn v. Bristol (supra)* is distinguishable on the basis that that decision was a straightforward application of the doctrine of warranty of authority. The solicitors had represented that they had authority from Mrs Penn, as a result of her husband's fraud, they did not. There was no issue as to who "Mrs Penn" was for these purposes or what attributes she had. It was not a case in which someone was purporting to be Mrs Penn, so as to raise a potential issue as to which of two individuals was the subject matter of the implied warranty of authority. Nor did any issue arise as to her attributes, as she was the joint owner of the property. The lenders having failed to obtain any rights against Mrs Penn, had a claim against the solicitors for breach of warranty of authority.

[53] In our view, the consideration of the scope of any implied warranty of authority made by the first defendant should be premised on the following underlying principles. First, the basic representation is only that the agent has authority to act for another and this is something within the agent's own knowledge. Secondly, an agent does not warrant that his principal will perform the contract or is solvent or make any other representation as to the principal's attributes or characteristics. Third, the court should not imply a warranty of authority which has an effect of going beyond the basic representation, save where the necessary promise is to be implied. This is especially so in relation to professionals, including solicitors, who do not usually undertake an unqualified obligation.

[54] The question for determination is whether the circumstances are such that the warranty of authority given by the first defendant is more extensive in effect so as to warrant that he was acting for the true owner of the land. In her judgment, the learned judge found the first defendant liable "because he has given an implied undertaking that he has the authority to act for Soh Chuan Seng as the true owner of the land". The learned judge rejected the first defendant's argument that he genuinely believed that he acted for the true owner and that he had no means of knowing that his client was an imposter. The learned judge citing *Yonge v. Tonybee (supra)* adopted a strict liability approach. The learned judge held that an agent is personally liable irrespective of whether he had acted *bona fide* or under a mistaken belief or had no means of knowledge. Although *Yonge v. Tonybee (supra)* is often cited as a leading case on liability for breach of warranty of authority, it is only a case concerning the inherent jurisdiction of the court concerning costs.

[55] The facts of the present case are similar to that in *Fullji Realty Sdn Bhd (supra) and P & P Property Ltd (supra)* in that the first defendant had acted for a fraudster who claimed to be the proprietor. In this connection, it is pertinent to examine the background facts leading up to the first defendant's retainer as solicitor for the fraudster. In early May 2012, one Mr Sivarajah a/l Palanisamy contacted the first defendant with the intention of referring a land sale transaction whereby the first defendant was to act for the vendor. Later, on 9 May 2012 Sivarajah together with the fraudster met the first defendant. The fraudster gave his National Registration Identity Card ("IC") and the original title deed to the land. The first defendant satisfied himself that (i) the IC was genuine and that the fraudster was Soh Chuan Seng, and (ii) the details in the original title deed corresponded with the details of the IC. It is also in the evidence the first to fourth plaintiffs were introduced to the land by one Mr Ang, a friend of the fourth plaintiff. The fraudster informed the first defendant that the parties have agreed on the purchase price of RM2.6 million, the terms of payment and that the second defendant would be acting as the plaintiffs' solicitors in the land sale transaction. Pursuant thereto, the second defendant forwarded the draft SPA to the first defendant for the first defendant's approval and comments. After the draft SPA was finalised, the SPA was executed by the plaintiffs before it was sent over to the first defendant for execution by the vendor. After the SPA was stamped, the transaction took the course as is usual in conveyancing matters. Upon the balance purchase price being tendered to the vendor, the second defendant presented the transfer documents together with the original title deed at the Land Registry for registration. The transfer of the land in favour of the plaintiffs was registered on 10 September 2012. A Registrar's caveat was lodged against the land on 19 September 2012 and later cancelled on 9 November 2012. Top Glove was subsequently registered as the proprietor of the land on 29 November 2012 thereby displacing the plaintiffs' interest in the land.

[56] On the evidence, it is plain that the first defendant warranted to the plaintiffs that he was acting for the fraudster - an imposter pretending to be Soh. As such, this is not a case in which, absent a warrant of authority, the plaintiffs would have no claim against the fraudster, notwithstanding the likelihood that the claim would be against someone who cannot be traced and from whom recovery is remote. We have carefully scrutinised the record of appeal and find that there is no evidence to justify a finding that the warranty of authority was given on the basis that the first defendant identified the fraudster as the true owner of the land. In other words, there is no evidence to justify an extension of the scope of the implied warranty of authority made by the first defendant. Accordingly, we are constrained to hold that there was a misdirection in law and in fact in the court below on this issue.

[57] We will now address the second issue relating to the first defendant's breach of stakeholder's duties. The law on this issue is well settled. The word 'stake' is generally used to apply to any money to be disposed of in accordance with the occurrence of a future event; and the party in possession of the money is often described as a stakeholder. How the money is to be disposed of depends on the terms on which it is held (see *Halsbury's Laws of Malaysia* para. 420.020). A stakeholder is defined as a person who receives money and holds it *in medio* (in the middle) pending the outcome of a future event (*Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73; [1983] 1 MLJ 256). As a rule, the duty of a stakeholder is to hold the money as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands (*Hampden v. Walsh* [1976] 1 QBD 189). As to what is in essence stakeholding in the particular circumstances of the present case we need only refer to the following erudite passage from the judgment of Federal Court delivered by Jeffrey Tan FCJ in *Datuk M Kayeas (supra)* which bears reproduction *in extenso*.

> [31] In our system of conveyancing, "the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in the future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held "(*Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). "solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or *quasi*-contractual capacity" (*Halsbury's Laws of England* 4th edn. Reissue vol. 44(1) para. 126). "… the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe" (*Bentley and Anor v. Gaisford* [1997] 1 All ER 842, 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or *quasi*-contractual capacity

(see *Alimand Computer System Ltd v. Radcliffes & Co*, The Times 6 November 1991). "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as an agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at p. 1287, [1967] Ch 1194 at p. 1200) per Cross J. until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank …" (*Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment which statement of the law was accepted by the House of Lords in *Sorrell v. Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Another (supra)*, *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor (supra)* and *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal (supra)*, amongst others). "Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust" (*Selvaratnam Vellupillai v. Dr Jayabalan Karrupiah* [2009] 1 CLJ 872; [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[58] In the first instance, the first defendant's argument that breach of stakeholder's duties was not pleaded is without merit as the particulars of the breach are contained in para. 50 of the amended statement of claim. The learned judge had carefully considered the material evidence and in particular to the fact that the first defendant released the balance purchase price in breach of cl. 5(b) of the SPA. We are not persuaded that there was any misdirection on the evidence by the learned judge. Consequently, we would affirm the finding of fact of the learned judge that the first defendant was in breach of his stakeholder's duties.

[59] Having dealt with the first defendant's appeal, we will now deal with the third to sixth defendants' appeal against the finding that they were negligent in issuing two issue documents of title for the same land and in not maintaining proper records on registration of transfers of land. We have carefully scrutinised the appeal records and we are not persuaded that there was any misapprehension of the facts or any misdirection on the evidence. As such, we agree with the findings of fact by the learned judge. The learned judge also applied the correct principles of law as enunciated by the Court of Appeal in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2015] 6 CLJ 740 (CA); which Court of Appeal decision was recently affirmed by the Federal Court in *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2016] 9 CLJ 297; [2016] 6 AMR 595 (FC).

A **[60]** For the foregoing reasons, the finding of the learned judge holding the first defendant liable for breach of warranty of authority is set aside. The finding of the learned judge on the first defendant's liability for breach of stakeholder's duties is affirmed. The finding of the learned judge against the third to sixth defendants on negligence is affirmed. In the light of the
B aforesaid, we vary the apportionment of liability and contribution as follows:

first defendant	-	30%
second defendant	-	10%
third to sixth defendants	-	60%

C **[61]** In conclusion, the first defendant's appeal is allowed in part with no order as to costs. The third to sixth defendants' appeal is dismissed with costs.

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